

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

HENRY M. DAVIS,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 4:10-CV-1429 NAB
)	
MICHAEL WHITE, et al.,)	
)	
Defendants.)	

**PLAINTIFF'S MOTION FOR SANCTIONS FOR SPOILIATION OF EVIDENCE
AND REQUEST FOR ADVERSE INFERENCE INSTRUCTION**

COMES NOW Plaintiff Henry M. Davis ("Plaintiff") and respectfully requests this Honorable Court to grant his Motion for Sanctions for Spoliation of Evidence and Request for Adverse Inference Instruction and states to this Honorable Court the following:

1. On the date of the incident subject to this case, September 20, 2009, the Ferguson jail had security cameras recording where the alleged excessive force took place.

2. The Non-Lethal Force Report, regarding the incident subject to this case, states: "Describe evidence obtained: Jail Area Surveillance Cameras". (*See Plaintiff's Exhibit 1 attached hereto – Non-Lethal Force Report*).

3. There was a camera directly across from Cell #3 pointing directly into the cell where Plaintiff allegedly bled on the officers' uniforms and committed a battery by punching Counterclaimant Michael White ("Counterclaimant") in the face. (*See Plaintiff's Exhibit 2 attached hereto – Deposition of William Mudd, TR. 12:22-13:10; 86:17-87:19; Plaintiff's Exhibit 3 attached hereto – Photo #1 of Ferguson jail; Plaintiff's Exhibit 4 attached hereto – Photo #2 of Ferguson jail; Plaintiff's Exhibit 5 attached hereto – Photo #3 of Ferguson jail*).

4. In Defendant City of Ferguson, Missouri's ("Ferguson") answer to Interrogatory

No. 9 of Plaintiff's First Interrogatories, Ferguson answered, "Yes, there are two VHS video tapes of the jail and the police department that may depict the Plaintiff. Copies of these tapes will be produced" to the interrogatory, "Please state whether you are aware of or have in your possession any photographs or video recordings of the events which are the subject of this suit". Said answer was sworn to on February 8, 2011. (*See Plaintiff's Exhibit 6 attached hereto – Ferguson's Answers to First Interrogatories*).

5. Defendants' counsel provided Plaintiff with a DVD of security footage of the Ferguson jail cells, however, the DVD is recorded at approximately 32 times normally speed and when played back, it shows the cameras switching from cell to cell at a high rate of speed. (*See Plaintiff's Exhibit 7 attached hereto – Ferguson DVD Video*).

6. On May 28, 2013, Ferguson provided a supplemental answer to Interrogatory No. 9 of Plaintiff's First Interrogatories stating, "No. Upon information and believe, the previously provided two VHS tapes (or DVD copies) depicted the same day of the event, but after the subject incident." (*See Plaintiff's Exhibit 8 attached hereto – Ferguson's Supplemental Answers to First Interrogatories*).

7. Within 48 hours after the incident subject to this case, Defendant Beaird personally requested the video of the security cameras from Sgt. William Mudd and also from Sgt. William Ballard, but never received a copy. (*See Plaintiff's Exhibit 9 attached hereto, Deposition of John Beaird, TR. 83:10-85:10; 86:17-87:19*).

8. Sgt. William Ballard typed and sent a letter to Sgt. William Mudd with directions to preserve the jail surveillance video from the incident subject case. (*See Plaintiff's Exhibit 10 attached hereto, Deposition of William Ballard, TR. 29:8-32:17*).

9. On September 20, 2009 Sgt. William Mudd was the communications supervisor

where part of his duties was to remove and secure the video from the jail surveillance cameras and the tapes were stored in Sgt. William Mudd's office. (*See Plaintiff's Exhibit 2 attached hereto – Deposition of William Mudd, TR. 8:15-10:7*).

10. Sgt. William Mudd acknowledged that he received a written request from Sgt. William Ballard to preserve video from the jail surveillance cameras relating to an incident that occurred on September 20, 2009 and Sgt. Mudd, "removed the tapes for 2009 and banded them together with Sergeant Ballard's name and the complaint number and filed it away." (*See Plaintiff's Exhibit 2 attached hereto – Deposition of William Mudd, TR. 18:8-18*).

11. Sgt. Mudd stated he only took the video out of the locked cabinet to provide it to the city when it was requested. (*See Plaintiff's Exhibit 2 attached hereto – Deposition of William Mudd, TR. 19:14-25*).

12. The DVD provided to Plaintiff was transferred from VHS to DVD without the use of a "multiplexer". (*See Plaintiff's Exhibit 2 attached hereto – Deposition of William Mudd, TR. 21:12-22:25*).

13. Despite all of the aforementioned documents and testimony regarding the preservation of the jail surveillance video that would have captured the alleged punch of Plaintiff on Counterclaimant, the video has magically disappeared and the DVD that has been produced is conveniently unwatchable and is not from the date of the incident subject to this case, September 20, 2009.

14. The evidence strongly supports that the video has been intentionally destroyed or withheld.

15. As a sanction for the spoliation, Plaintiff attaches hereto a proposed adverse inference instruction to be read to the jury. (*See Plaintiff's Exhibit 11 attached hereto – Adverse*

Inference Instruction).

WHEREFORE, for the foregoing reasons, and those stated in Plaintiff's Memorandum in Support, Plaintiff respectfully requests this Honorable Court to grant Plaintiff's Motion for Sanctions for Spoliation and accept Plaintiff's attached jury instruction of an adverse inference with respect to the spoliation of evidence and for such other and further relief as this Court deems just and proper under the circumstances.

Respectfully submitted,

SCHOTTEL & ASSOCIATES, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2014, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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